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why it should be governed in all respects by the law of the place of making. The intention of the parties should certainly be given some effect in determining the law applicable to a contract. Why should not all the usual covenants for title be regarded as governed by the law of the *situs?* The definition of seisin, the definition of right to convey, must surely be determined by that law. Why not everything connected with the covenant? The accident that subsequent assignees might not sue under the doctrines of the common law, does not lessen the fact that the covenant of seisin was essentially one respecting title. Because the covenant does not run with the land is no reason for deciding that its existence and effect are not to be governed by the law of the place where the land is situated; it is essentially real, in the sense that it immediately concerns the title to land. *I. A. C.*

CONTRACTS: NECESSITY OF TENDER TO INVALIDATE RELEASE OF PERSONAL INJURY CLAIM PROCURED BY FRAUD—A decade ago, the courts were sharply divided as to the necessity of tender of the consideration received for a release procured by fraud, as a condition precedent to a trial of the original cause of action.[1] Today, judicial opinion, which may fairly be said to have crystalized,[2] makes the decision hinge on the distinction between fraud as to the nature of the instrument signed, and fraud as to collateral matters. The former renders the instrument void *ab initio,* and here tender is held unnecessary, there being, in legal contemplation, no act to rescind.[3] The latter renders the release voidable only,[4] which is therefore still a bar until rescinded. It is further held that the case does not come within any of the exceptions to the rule that an offer to restore the consideration received is a condition precedent to rescission.[5]

This development represents a gain in uniformity, but a loss in liberality. Suppose, for example, that the releasor has in good faith spent the consideration received, before learning of the fraud practiced upon him, and is unable by reason of his poverty to replace it. The requirement of restoration to status quo is an equitable one,[6] and ought never be applied mechanically, so as to work injustice,[7] particularly in favor of a wilful wrongdoer as against his innocent victim. It is true that plaintiff may not recover anything even if allowed to sue. In that event, justice could not be done to all parties by the simple expedient of deducting the amount received for the release from the judgment awarded, and defendant would be put to the expense of a suit which he had paid to avoid.[8] But "it appears to us that this expense to the one found guilty of deception is not of sufficient consequence to warrant a court of equity in denying the defrauded one his day in court."[9]

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[1] See 12 R. C. L. 411, ff. for a good summary of the whole field. See also, 1 Bailey, Personal Injuries, p. 201; 35 L. R. A. (N. S.) 660; 5 Pomeroy's Equity Jurisprudence (4th ed.) p. 4761, ff.

[2] Ann. Cas. 1912D 1084; L. R. A. 1918F 1073.

[3] Meyer v. Haas (1899) 126 Cal. 560, 58 Pac. 1042; Thoroughgood's Case (1582) 2 Co. Rep. 9a, 76 Eng. Rep. R. 408; 1 Page on Contracts (2d ed.), p. 344.

[4] 1 Page on Contracts (2d. ed.), p. 544.

[5] See n. 2, supra; for a representative case, see also Swan v. Great Northern Ry. Co. (1918) 168 N. W. 657 (N. D.), L. R. A. 1918F 1063.

[6] 5 Pomeroy's Equity Jurisprudence (4th ed.) p. 4762.

[7] Clark, Equity, pp. 503, 523.

Furthermore, it is generally overlooked that the releasor may elect to sue in deceit for the loss of his remedy.[10] Since we have abolished forms of action in California,[11] and plaintiff is entitled to relief providing his complaint states a valid cause of action,[12] the case might simply be sent back for retrial with directions to amend.[13] This remedy in deceit, however, is not completely satisfactory, because the measure of damages is not the face value of the claim released, but only its probable value to the releasor.[14]

California follows the majority rule stated above in *Garcia v. California Truck Company*,[15] where the court held that "the contract of release was at most a mere voidable contract" and that "plaintiff could not avoid the same on the ground of fraudulent representations, without . . restoring the money paid as a consideration." So far as the particular case is concerned, the decision is undoubtedly correct, since no special circumstances appear which make the requirement inequitable. The case, however, includes a dictum to the effect that the doctrine of fraud in the factum rendering the instrument void *ab initio* would not apply to a case where the releasor knew he was signing a release, even though there was a fraudulent representation that the instrument also contained a promise of life employment. This dictum neglects the whole basis of the doctrine that fraud in the factum renders the instrument void *ab initio* (and not merely voidable), which is, as

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[8] This is pointed out clearly in Garcia v. Calif. Truck Co. (Sept. 29, 1920) 60 Cal. Dec. 343, 192 Pac. 708.

[9] Rase v. Minneapolis etc. Ry. Co. (1912) 118 Minn. 437, 137 N. W. 176.

[10] Urtz v. N. Y. R. Co. (1911) 202 N. Y. 170, 95 N. E. 711; Gould v. Cayuga Bank (1885) 99 N. Y. 333, 2 N. E. 16; Bailey v. London Guarantee and Accident Co. (1918) 121 N. E. 128 (Ind. App.); Rochester Bridge Co. v. McNeill (1919) 122 N. E. 662 (Ind.); Desmaris v. People's Gaslight Co. (1919) 107 Atl. 491 (N. H.); Brown v. Ocean Accident Corp. (1913) 153 Wis. 196, 140 N. W. 1112; Swan v. Great Northern Ry. Co., supra, n. 5 (dictum); Westerfeld v. N. Y. Life Ins. Co. (1900) 129 Cal. 68, 58 Pac. 92. Contra, Whitman v. Seaboard Co. (1917) 107 S. C. 200, 92 S. E. 861, L. R. A. 1917F 719 and note; 68 University of Pennsylvania Law Review, 188.

[11] Cal. Code Civ. Proc. § 307.

[12] Cal. Code Civ. Proc. §§ 426, 580; Hurlbutt v. Spaulding Saw Co. (1892) 93 Cal. 55, 57, 28 Pac. 795; Fox v. Hall (1912) 164 Cal. 287, 128 Pac. 749.

[13] Cf. Zellner v. Wassman (1920) 60 Cal. Dec. 428, 193 Pac. 84. Such procedure might be attacked on the ground that plaintiff has irrevocably elected to rescind, by framing his complaint on that theory; but this view has been repudiated in California: Montgomery v. McLaury (1904) 143 Cal. 83, 88, 76 Pac. 964.

[14] Gould v. Cayuga Bank, supra, n. 10; Westerfeld v. N. Y. Life Ins. Co. supra, n. 10.

[15] Supra, n. 8. See also Baird v. Pac. Elec. R. Co. (1919) 39 Cal. App 512, 179 Pac. 449.

Professor Wigmore points out clearly,[16] that the overt act does not represent the real intention of the signer. What, then was the releasor's real intention here? A releasor never has the general intent merely to sign a "release," but always the specific intent to sign a particular kind of release. The test should be, Does the misrepresentation go to the essence of the instrument?[17] The omission of a promise of life employment does go to the essence, just as much as an addition or substitution of terms would, and the instrument ought therefore be considered void *ab initio*. This is the conclusion which has been reached in other jurisdictions where the question has arisen.[18]

Technical difficulties such as the above, which unduly hamper the courts, even where they are inclined to be liberal, as in California,[19] are inevitable as long as personal injury claims and releases thereof are governed by the general rules of tort and contract. But to a great extent the rules of tort on the whole subject of personal injury claims have been rendered obsolete by the possibility of social insurance.[20] The Workmen's Compensation Act,[21] which is the chief manifestation of the new tendency, furnishes likewise a solution of the subsidiary problem of the fraudulent release, by requiring the approval of the Industrial Accident Commission.[22] In this respect, as well as in major matters, the principles of the Act should be applied to negligence cases in general. *H. R.*

CORPORATIONS: NON-LIABILITY TO CORPORATION CREDITORS OF INNOCENT PURCHASER OF WATERED STOCK—Mr. Justice Olney has contributed a good deal to the clarifying of a hitherto much-confused branch of the California law of corporations, in *Rhode v. Dock-Hop Company*.[1] Here it was held that a transferee of

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[16] 4 Wigmore on Evidence, p. 3394 ff.

[17] See 4 Brit. Rul. Cas. 663.

[18] McDonald v. Central Ry. Co. (1916) 39 N. J. L. 251, 98 Atl. 391; Hayes v. Atlanta Etc. Air Line R. R. (1906) 143 N. C. 125, 55 S E. 437, 10 Ann Cas. 737.

[19] Releases have been set aside in California in the following cases: Wilson v. S. F. Oakland Terminal Ry. (1920) 32 Cal. App. Dec. 680, 191 Pac. 925 (fraud and undue influence, with dictum to the effect that neurasthenia, if present, would give rise to an even closer scrutiny); Carr v. Sacramento Clay Products Co. (1917) 35 Cal. App. 439, 170 Pac. 446 (fraud, mistake, undue influence, mental incapacity); Edmunds v. S. P. Co. (1912) 18 Cal. App. 532, 123 Pac. 811 (fraud, undue influence); Meyer v. Haas, supra, n. 3 (fraud and mistake); Smith v. Occidental etc. S. S. Co. (1903) 99 Cal. 462, 34 Pac. 84 (undue influence). The court has refused to invalidate the release in the following cases: Haviland v. S. Calif. Edison Co. (1916) 172 Cal. 601, 158 Pac. 328; Rogers v. Atchison etc. R. Co. (1918) 38 Cal. App. 343, 176 Pac. 176; Garcia v. Calif. Truck Co., supra, n. 8.

[20] See note in 8 California Law Review, 269, and references cited therein.

[21] Workmen's Compensation Act, Cal. Stats. 1917, ch. 586.

[22] Idem, § 27 (b).

[1] (Nov. 20, 1920) 60 Cal. Dec. 599, 194 Pac. 11.